

## **EXPLANATORY STATEMENT**

### **Issued by authority of the Assistant Treasurer and Minister for Financial Services**

#### *Tax Agent Services Act 2009*

#### *Tax Agent Services (Code of Professional Conduct) Determination 2024*

The *Tax Agent Services (Code of Professional Conduct) Determination 2024* (the Instrument) is a legislative instrument made under section 30-12 of the *Tax Agent Services Act 2009* (the Act). Section 30-12 of the Act provides that the Minister may, by legislative instrument, determine obligations that elaborate or supplement any aspect of the Code of Professional Conduct (the Code). The Code is set out in section 30-10 of the Act and establishes ethical principles that apply to all registered tax agents and business activity statement (BAS) agents (together referred to as ‘tax practitioners’). This Instrument sets out additional professional and ethical obligations of tax practitioners under section 30-10 of the Act. Taken together, these obligations form the Code of Professional Conduct for tax practitioners in Australia.

The Code is administered by the Tax Practitioners Board (the Board), which regulates tax practitioners across Australia, including their compliance with the Code. Under subsection 30-10(17) of the Act, a tax practitioner must comply with any obligations the Minister determines under section 30-12 of the Act. Where the Board finds a failure to comply with the Code or finds that the conduct constitutes a breach of the Act under section 60-125 of the Act, the Board is able to take a range of actions including making orders or suspending or terminating tax practitioners’ registration, so as to support public trust and confidence in the integrity of the tax profession and of the tax system by ensuring that tax agent services are provided to the community in accordance with appropriate standards of professional and ethical conduct.

The Instrument is part of a larger range of measures giving greater efficacy to the Board’s regulation of the tax practitioner profession. It follows amendments to the Act that introduced the concept of disqualified entities, who, due to certain findings of misconduct, cannot be used to provide tax agent services on behalf of a tax practitioner without the Board’s permission.

The Instrument elaborates on and supplements the Code to outline the high professional and ethical standards expected by the community of tax practitioners. This improves transparency and accountability and gives the public greater confidence and assurance in the integrity of the profession. This Instrument contributes to the strengthening of the regulatory framework and the regulation of the profession in the context of recent public scrutiny of misconduct in the tax practitioner profession. While some of the professional and ethical obligations found in the Instrument are general in nature, others specify obligations relating to dealings with the Government as a client. All these additional obligations are consistent with the Code as set out in the Act.

The Act does not specify any conditions that need to be satisfied before the power to make the Instrument may be exercised.

An exposure draft of the Instrument and explanatory materials were published on the Treasury website on 10 December 2023, with submissions invited by 21 January 2024. A

total of 9 public submissions were received, including a joint submission representing 8 professional associations. Submissions were broadly supportive of the intent of the Instrument to ensure high standards in the profession, and while some supported the Instrument as drafted, many sought greater guidance on how the proposed new obligations would apply in practice.

A range of amendments have been made to the Instrument to address feedback received. The majority of these provide greater clarity and detail on how the obligations will apply in different scenarios, while retaining appropriate flexibility. Some amendments address gaps raised through stakeholder feedback and others clarify interactions with existing laws. The Board will also issue guidance materials intended to support registered tax practitioners to comply with the new obligations in the Code.

This Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*. This Instrument is disallowable and is subject to sunseting.

This Instrument commences on 1 August 2024.

Details of the Instrument are set out in Attachment A.

The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is at Attachment B.

The Office of Impact Analysis (OIA) has been consulted (OIA ref: OIA24-07286) and agreed that an Impact Analysis is not required. The measure is estimated to have no/a low impact on compliance costs.

**Details of the Tax Agent Services (Code of Professional Conduct) Determination 2024**

Part 1 - Preliminary

Section 1 – Name

This section provides that the name of the instrument is the *Tax Agent Services (Code of Professional Conduct) Determination 2024* (the Instrument).

Section 2 – Commencement

Schedule 1 to the Instrument commenced on 1 August 2024.

Section 3 – Authority

The Instrument is made under the *Tax Agent Services Act 2009* (the Act).

Section 4 – Definitions

This section provides definitions for key terms used in this Instrument.

Subdivision A – Preliminary

**Additional obligations relating to the professional and ethical conduct of registered tax agents and BAS agents**

Section 5 identifies that the purpose and authority for this Instrument is section 30-12 of the Act, which permits the Minister to determine additional obligations that form part of the Code of Professional Conduct (the Code). The Code consists of the obligations in section 30-10 of the Act together with any obligations determined by the Minister under section 30-12 of the Act. All registered tax agents and BAS agents (together referred to as ‘tax practitioners’) are required to comply with the Code.

This Instrument does not create any new obligations on tax practitioners that are inconsistent with their obligations under the Code.

Subdivision B – Honesty and integrity

**Upholding and promoting the ethical standards of the tax profession**

Section 10 of the Instrument sets out obligations on tax practitioners to uphold and promote the Code and to *not* engage in conduct that may undermine public trust and confidence in the integrity of the tax profession or tax system. Section 10 also requires tax practitioners to *not* engage in conduct that may undermine the collective work of the tax profession to uphold and promote the Code, public trust and confidence in the integrity of the tax profession and tax system, or individual accountability within the profession. The obligation applies to tax practitioners in any professional role. Section 10 recognises that all tax practitioners play an important role in upholding an ethical tax profession and system that the public can trust and rely upon. This obligation is supported and consistent with the new notification requirements relating to identified breaches of the Code in Subdivision 30-C of the Act.

The obligations in section 10 of the Instrument apply to tax practitioners on their own, and in cooperation with other tax practitioners. This recognises that tax agent services are often provided collectively by multiple people within an organisation. A company or partnership can be a registered tax practitioner and employ or otherwise engage individuals who are not themselves registered tax practitioners but who work under the guidance and supervision of other employees or partners who are registered tax practitioners. Tax practitioners are responsible for the conduct of any unregistered individuals, such as employees, contractors and any other assistants providing tax agent services on their behalf, in order to meet their obligations as tax practitioners. Section 10 also encourages a tax profession with high ethical values, that does not turn a blind eye to misconduct, and does not shy away from taking action against the misconduct of one of their own in order to maintain public trust and confidence in the profession and in the tax system.

What the obligation to uphold and promote the Code requires in practice will depend on the individual circumstances of each tax practitioner and may depend on the size and nature of a particular tax practice and the degree of authority and control of an individual within a firm. Without limiting the scope of the obligation, tax practices, in cooperation with individual tax practitioners within them, should institute measures such as:

- providing training and resources on complying with the Code;
- introducing and actively undertaking processes to manage underperformance in relation to breaches of the Code;
- instituting mechanisms for staff to report and address concerns about conduct that may breach the Code;
- providing appropriate and adequate protection for staff that report conduct that may breach the Code;
- providing directions to staff not to engage in specific conduct where that conduct may result in a breach of the Code;
- maintaining appropriate records relating to potential breaches of the Code;
- processes for amending or correcting false or misleading statements in documents or conversations;
- having recruitment processes that include police checks, checks of the Tax Practitioners Board's (the Board's) register and checks to test whether someone is a disqualified entity;
- encouraging compliance with the Code when considering remuneration, including promotions and bonuses, as well as in other human resource policies; and
- developing a culture of transparency, accountability, ethical conduct, and compliance with the Code and with the tax laws.

Paragraph 10(b) recognises that public trust and confidence in the tax profession and the tax system is influenced by the actions of tax practitioners, and that misconduct by individual tax practitioners reflects on the profession and the tax system as a whole. It makes conduct that is likely to have the effect of undermining public trust and confidence in the tax profession and the tax system a breach of the Code, where the tax practitioner knows or ought reasonably to know that the conduct is likely to have that effect.

Paragraph 10(c) recognises an expectation that the profession works collectively, including through professional bodies, to uphold and promote the Code, public trust and confidence in the tax profession and tax system, and holding each other accountable for a practitioner's own actions. It makes conduct that might undermine those collective efforts a breach of the Code, provided that the tax practitioner knows or ought to know that the conduct might have that effect.

Without limiting the scope of the section, the following would very likely be evidence of a breach of section 10:

- *not* removing staff from a project or work area where there are reasonable concerns about potential unethical conduct relating to the project or work area;
- asking *not* to be informed of, or for appropriate records to be made of, information relating to potential breaches of the Code;
- destroying evidence relating to any potential breach of the Code;
- taking or threatening any adverse action against an individual who raises concerns about potentially unethical conduct; or
- rewarding an individual in relation to conduct that is unethical or otherwise encouraging (or not discouraging) such unethical behaviour.

The Board has discretion in determining whether to seek or apply a sanction, or which sanction available under the Act should be sought or applied, in response to a breach of the Code. The Board will have regard to the degree of misconduct and level of intent and culpability involved in any failure to comply with section 10, as well as the objects of the Act, in applying its discretion.

### **False or misleading statements**

Section 15 outlines obligations in relation to false and misleading statements. Subsection 15(1) prohibits tax practitioners from making, preparing, permitting, or directing false or misleading statements to be made to the Board or to the Commissioner of Taxation.

Paragraph 15(1)(a) covers statements made directly by a tax practitioner (not for or on behalf of another) such as statements made to the Board when applying for registration, in relation to being a fit and proper person or having relevant skills and experience.

Paragraph 15(1)(b) covers statements prepared by a tax practitioner, such as where the practitioner prepares a document for a client to provide to the Board or Commissioner in the client's name, provided that the practitioner knows, or ought reasonably to know, that the statement will be provided to the Board or Commissioner. Paragraph 15(1)(c) applies to a tax practitioner permitting or directing someone else to make or prepare such a statement, which would cover a tax practitioner delegating work to staff who may or may not themselves be tax practitioners, or any other attempt to circumvent the obligation by having someone else prepare or make the statement.

The obligations in subsection 15(1) apply whether the tax practitioner made, prepared, permitted or directed a statement to be made in their capacity as a tax practitioner, or in another professional role, such as during consultation on draft legislation, or in relation to the tax practitioner's personal tax affairs, or in any other capacity.

Subsection 15(1) applies to statements that the tax practitioner knows, or ought reasonably to know, are false, incorrect or misleading in a material particular. Similarly, section 15(1) applies to statements that omit information that results in the statement being misleading in a material respect. It applies to statements made in writing or orally.

The nature of the obligation is one of truthfulness and integrity. The provision is concerned with particulars that are material in nature. That is, it is not concerned with particulars that are trivial in the circumstances in which the statement has been made. A statement should not be contrary to fact, nor should it give the wrong impression with regard to a material particular. Expanding this obligation to include statements made in a tax practitioner's personal and professional activities highlights the importance of a tax practitioner's role in representing the tax profession and preserving public confidence in the tax system, particularly when making representations to the Board or Commissioner in relation to their own or their clients' tax affairs. Honesty and integrity are fundamental to any profession governed by a code of ethics, that must act in the best interests of those they represent or serve, and is also responsible and accountable to the public for maintaining trust and integrity in a regulatory system in which they operate and have a level of guardianship over.

Subsection 15(2) requires tax practitioners to take reasonable steps to correct a false, incorrect or misleading statement provided to the Board or Commissioner as soon as possible after becoming aware that it was false, incorrect or misleading in a material particular or was misleading in a material respect due to an omission. The obligation to correct a statement applies to statements that are false, incorrect or misleading at the time that they are made, regardless of when the tax practitioner becomes aware that the statement was false, incorrect or misleading. However, there is no obligation under the Code to take action in relation to a statement that was *not* false, incorrect or misleading at the time it was made, but later becomes false or misleading because of some later event, for example, there was a change to the law that operates on a retrospective basis, or a decision of a court or tribunal finds that the law operates differently to what had been the generally understood interpretation and administrative practice, or the Board or Commissioner withdraws guidance and advice relied upon in the preparation of the statement.

While section 15 of the Code does not extend an obligation to correct a statement that was *not* false, incorrect or misleading at time it was made, but later becomes false or misleading because of some later event, to mitigate the potentially overly burdensome compliance costs for a tax practitioner that would otherwise follow from such an event, it may nonetheless be appropriate for the tax practitioner to take action in relation to such a false or misleading statement where they are advising on the matter or on a related matter. Other obligations under the Act or Code may apply to past statements that become false, incorrect or misleading after they are made, such as the obligation to lawfully act in the client's best interests or to notify the TPB of a change in circumstances.

Paragraph 15(2)(a) requires a tax practitioner to correct a false, incorrect or misleading statement that they have made, or that they have permitted or directed someone else to make on their behalf to the Board or Commissioner. Paragraph 15(2)(b) requires a tax practitioner to advise the maker of a false, incorrect or misleading statement (that the tax practitioner prepared, or has permitted or directed someone else to prepare) that a statement that they have made is false or misleading and that they need to take action to correct the statement.

This covers, for example, where a tax practitioner prepares a client's tax return and then submits the return to the Commissioner on the client's behalf. As the tax practitioner would require the client's consent to request an amendment to the income tax assessment, made on information based on the income tax return, the obligation instead requires the tax practitioner to advise the client to take action to correct the statement themselves, or authorise the tax practitioner to take the necessary action to correct the statement on their behalf.

Where the maker of the statement refuses to take action to correct the statement, or provide consent for the tax practitioner to correct the statement, paragraph 15(2)(c) requires the tax practitioner to notify the Board or the Commissioner that the statement is false, incorrect or misleading in a material particular, or omitted some matter or thing without which the statement is misleading in a material respect. A notification should advise on which part of a statement is false, incorrect or misleading.

These new Code items oblige tax practitioners to employ high levels of honesty and integrity in the service they provide and encourages accountability for statements they make or prepare and responsibility for ensuring the Board and Commissioner have access to the most accurate information so as to ensure ongoing public trust in the tax profession and tax system. Correcting or notifying in relation to false, incorrect or misleading information will also be factored into consideration of any potential sanction in relation to the original false or misleading statement where the tax practitioner's involvement in that statement was a breach of the Code.

If a tax practitioner discloses confidential information as permitted by section 15 of the Code or another legal obligation, that will not be a breach of the general confidentiality obligations in the Code. Notifying the TPB or Commissioner that a statement was false, incorrect or misleading in a material particular at the time that it was made as required by section 15 of the Code will also not contravene the general confidentiality requirements in the Code as those requirements do not apply to the extent there is a legal duty to disclose.

Subsection 15(3) extends the same obligations in relation to false, incorrect or misleading statements that apply to statements made to the Board or Commissioner under subsection 15(1) to also apply to statements provided to other Australian government agencies. Australian government agency is defined in section 995-1 of the *Income Tax Assessment Act 1997* (ITAA 1997) as the Commonwealth, State or Territory, or an authority of the Commonwealth, State or Territory. They include, for example, the Australian Securities and Investments Commission, Department of the Treasury and the Australian Competition and Consumer Commission.

### Subdivision C – Independence

#### **Conflicts of interest in dealings with government**

Section 20 requires tax practitioners to take reasonable steps to identify, document, disclose, manage, mitigate, and, as appropriate, avoid material conflicts of interest related to their dealings with Australian government agencies, which are defined in section 995-1 of the ITAA 1997. Conflicts of interest may be direct or indirect, apparent or real, and may involve a potential or perceived benefit or gain arising from these activities such as a misuse of confidential information obtained in government dealings or interference in the government's decision-making processes.

Section 20 applies to activities that a tax practitioner undertakes in a professional capacity. This is not limited to services provided as a tax practitioner, but extends to providing advice, assistance or feedback to government in relation to any professional capacity, whether paid or unpaid. It does not extend to activities or interactions of a personal nature.

Paragraph 20(a) requires tax practitioners to take reasonable steps to identify and document any material conflicts of interest in connection with an activity undertaken for a government agency. Examples of reasonable steps could include, but are not limited to:

- training staff on identifying, disclosing and documenting conflicts of interest;
- procedures for disclosure and record-keeping of potential conflicts of interest; and
- preliminary conflict checks prior to accepting clients or allocating staff to projects.

Section 20 also imposes an obligation to disclose details of a real or potential material conflict to the government agency they are dealing with as soon as a tax practitioner becomes aware of the conflict. Details to disclose to the government agency about a real or perceived conflict of interest may include:

- the nature of the conflict;
- the extent of the conflict;
- what interest, association or incentive gives rise to the conflict;
- the identity of the agents or others related to the conflict and the extent to which they have been involved in the services provided to the client;
- when the conflict was identified;
- how the advice or services provided to the client might have been different had there not been a conflict of interest;
- any benefit obtained due to the conflict of interest; and
- whether any actions have been taken or are proposed to avoid the conflict or to mitigate any damage arising from the conflict.

A tax practitioner should err on the side of caution and disclose details to a government agency where there is some uncertainty as to whether a conflict of interest arises or whether the conflict is material or not. An example of a material conflict would be where a tax practitioner is advising government on loopholes that exist in taxation law at the same time as advising their clients on how that same area of law operates in respect of that client's tax affairs and how the client can rearrange their affairs to minimise taxes payable. An example of a conflict of interest that would probably not be material would be advising government on a proposed change that applies across the board to the management of all superannuation funds while being a passive member of a superannuation fund.

The obligation to disclose a conflict of interest to government is not limited to a tax practitioner disclosing information about their own potential conflicts but extends to any material conflict of interest that they are aware of that arises in connection with an activity undertaken for the agency. For example, where a tax practitioner is undertaking an activity for an agency in their capacity as a tax practitioner and knows of another person's or entity's conflict of interest in undertaking the same or a different activity for government, section 20 imposes an obligation on the tax practitioner to disclose details of that conflict of interest to the relevant government agency.



Paragraph 20(c) requires tax practitioners to take reasonable steps to manage and mitigate material conflicts of interest, and where appropriate and possible, to avoid conflicts of interest. This acknowledges that it may not always be possible to avoid a conflict of interest.

Managing or mitigating a conflict of interest may involve taking steps to prevent the conflict from affecting the tax practitioner's advice or decisions, or the government agency's decisions. Reasonable steps to manage, mitigate and avoid conflicts of interest will depend on the circumstances and can consider the size of an entity, the type of work it does and the likelihood of conflicts of interest arising, among all other relevant factors. Examples of reasonable steps include, but are not limited to:

- enforcing procedures for managing, mitigating and avoiding conflicts of interest;
- allocating staff to projects in a way that manages or avoids potential conflicts of interest, for example by not allocating staff with conflicts to certain projects or tasks, or by allocating staff with conflicts of interest to work on initial identification and analysis of issues but having staff without conflicts of interest reviewing that analysis and making final decisions;
- having internal governance policies in relation to conflicts of interest that include consequences for failing to comply with those procedures;
- maintaining a conflict register and information handling procedures that utilise technology to limit information access to those with a legitimate need to know.

Following the disclosure of a conflict of interest with a government agency, the continued engagement of the tax practitioner will be at the agency's discretion based on the nature of the conflict and any mitigating actions taken by the tax practitioner. There may be circumstances where the only way that a government agency can obtain relevant and necessary expertise is from a tax practitioner that has a conflict of interest. In that case, the government agency can provide express consent to accept a particular conflict of interest in specific circumstances and the conflict of interest can be managed in a way consistent with that express consent.

#### Subdivision D – Confidentiality

##### **Maintaining confidentiality in dealings with government**

Section 25 ensures tax practitioners maintain confidentiality in dealings with government by seeking to protect the disclosure and use of information obtained in relation to activities they undertake with Australian government agencies. It applies to activities that a tax practitioner undertakes in a professional capacity, which is not limited to services provided as a tax practitioner but extends to providing advice, assistance or feedback to government in any professional capacity, whether paid or unpaid. It does not extend to activities or interactions of a personal nature.

Section 25 applies to activities undertaken with a government agency. This includes activities where a tax practitioner provides advice or services to a government agency, whether or not for a fee, but also activities where a tax practitioner is working together with a government agency outside of the provision of services, such as contributing views to consultation processes run by a government agency on potential legislative changes. The

obligation applies to information received by a tax practitioner directly from the Australian government agency, or indirectly, such as through staff working with the agency on behalf of the tax practitioner.

Subsection 25(1) prohibits tax practitioners disclosing information from an Australian government agency that was obtained directly or indirectly in connection with activities they undertake with the government agency, unless there is a legal duty to disclose the information or in other specified circumstances. There is no restriction on the disclosure of government agency information received outside of those activities, such as government information obtained from a publicly available government website or through the media.

The specific circumstance in which it is permitted to disclose government agency information obtained in connection with activities undertaken for government as a tax practitioner is where:

- it is reasonable to conclude that the agency authorised further disclosure of the information; and
- any further disclosure of the information was consistent with the agency's authorisation.

In practice, this will ensure that government agencies can establish limits on who may receive information, how information may be shared, and the form in which it is to be on-shared. Tax practitioners who fail to comply with these restrictions will be in breach of the Code.

Subsection 25(1) also complements section 20 in circumstances where disclosure is authorised to certain tax practitioners with a need to know the information, and not authorised to be disclosed to people who may have a material conflict of interest. For example, these requirements may limit authorised disclosure of government information to certain tax practitioners or individuals within an entity, rather than to the entirety of an entity or all individuals within it.

There is no requirement for information to be marked as confidential or identified as for limited distribution for subsection 25(1) to prohibit or limit its distribution or disclosure. However, these may be relevant factors in interpreting whether it is reasonable to conclude that the agency has authorised further disclosure of the information.

Other relevant factors in determining whether it is reasonable or not to conclude that further disclosure of the information is authorised by the government agency could be:

- the context in which the information was provided;
- any comments made by the agency when providing the information (such as in a disclaimer); and
- whether the information is available to be accessed outside of the context in which it was provided.

If information is sensitive or disclosure raises appreciable risks of potential misuse for personal advantage, there would be a presumption that further disclosure would not be reasonably authorised. Such a presumption would only be rebutted where the recipient of

the information held clear evidence that disclosure was authorised. If information is not sensitive and is widely available, it would be much easier to be satisfied that it would be reasonable to conclude that further disclosure was authorised unless the agency expressly provided otherwise. Where in doubt, a tax practitioner should consult the agency by seeking consent to further disclosure.

Subsection 25(2) limits the use of information from an Australian government agency that was obtained directly or indirectly in connection with activities undertaken for the government agency in a professional capacity. Such information cannot be used for personal advantage, or for the advantage of an associate, employee, employer or client, except where:

- it is reasonable to conclude that the agency authorised using the information in a way that may provide for such an advantage for the tax practitioner or their associate, employee, employer or client; and
- any further use of the information was done consistently with the agency's authorisation.

It is not necessary that the use was likely or guaranteed to result in an advantage. Use of the information would be prohibited where that use could potentially result in an advantage being gained by the tax practitioner or their associate, employee, employer or client.

This obligation imposes a strict restriction on tax practitioners to ensure that no personal advantage is taken using government information, except where it is reasonable to conclude the agency authorised this use. Subsection 25(2) also extends further than subsection 25(1) to capture associates, employees, employers or clients, in recognition that tax practitioners may use information for the personal advantage of others and potentially receive benefits indirectly through this unauthorised disclosure.

## Subdivision E – Competence

### **Keeping of proper client records**

Subsection 30(1) requires tax practitioners to keep correct records of all tax agent services they provide, or which are provided on their behalf, to each of their clients, including former clients. Keeping correct records includes making records, such as taking notes or writing a summary of advice provided orally to the client and information provided orally to the tax practitioner, and making notes of research that underpins the services provided. Keeping correct records also includes retaining records that already exist on the provision of tax agent services, such as client files, copies of written advice (including advice sent by email) and other documents that evidence the tax agent services provided to clients or the information that the advice is based on.

Subsection 30(2) includes additional requirements for records. Records must be in English or readily accessible and easily convertible to English. Records on each tax agent service provided need to be retained for at least 5 years after the service was provided. Records must show the nature, scope and outcome of the tax agent service provided, and include all relevant information considered in the provision of the tax agent service. For a complex matter, that relevant information will include the relevant facts, assumptions and reasoning underpinning any advice provided to the client. If one client received tax agent services on

a range of matters of different levels of complexity, the level of detail kept in each record of services provided can vary.

Section 100 provides for the obligation in section 30 to apply to the making and keeping of records relating to tax agent services that are provided on or after commencement of this Instrument, not to tax agent services provided before commencement. The requirement for the records to include all relevant information considered in the provision of the tax agent service could require information received from the client before commencement, or research or analysis conducted before commencement, to be included in the record of tax agent services provided after commencement, if they form part of the relevant information considered in providing a service on or after commencement.

For example, if a tax return is prepared or lodged after commencement, it would be necessary to keep records of all relevant information underpinning that return as part of the records of that tax agent service provided. Depending on the circumstances, that could include records of information provided by the client and decisions made or advice provided by the tax practitioner or on the tax practitioner's behalf before commencement that informed the return.

The obligations in section 30 exist alongside client obligations to keep and retain their own tax records. However, the records that a tax practitioner keeps in order to comply with section 30 could include the records that a client must also keep and retain under taxation law, as reviewed or adopted by the tax practitioner.

As the record-keeping obligation exists for former clients, if a tax practitioner ends an engagement with a client, they are still required to generate and retain records of the services provided within the engagement period.

Proper record-keeping is essential to maintain the integrity of a tax practice, particularly when disputes or queries arise in the future on the legality or accuracy of advice. Where tax practitioners are compliant with section 30, they will be able to refer to their records as clear evidence of their actions and clarify what actions occurred or advice was provided. Requiring the retention of records for 5 years also ensures alignment with the standard timeframe for record-keeping prescribed under Australian tax law.

### **Ensuring tax agent services provided on your behalf are provided competently**

Subsection 35(1) provides that tax practitioners must ensure that each entity providing services on their behalf maintains knowledge and skills that are adequate and relevant to the services that the entity is providing. This means that an entity, such as an employee of a tax practitioner, is not required to have detailed knowledge and skills in relation to all services provided by the tax practitioner, but must have knowledge and skills appropriate to the services that the employee is providing on the tax practitioner's behalf.

Subsection 35(2) requires tax practitioners to ensure that each entity providing tax agent services on their behalf is appropriately supervised. The level of supervision that is appropriate will differ from entity to entity, and will depend on the knowledge and skills of the entity, the tax agent services being provided by the entity, and the tax practitioner's system of controls (quality management). This means that the appropriate level of supervision can vary from one employee or contractor to another, and from one type of service to another.

This complements the elements of the Code contained in the Act, which requires that all tax practitioners maintain the relevant knowledge and skills necessary to ensure that tax agent services are provided competently by themselves and others on their behalf. Section 35 extends this by ensuring that not only registered tax practitioners are required to maintain skills, but individuals who provide these services on their behalf also maintain sufficient skills and knowledge to provide services competently. Due to the nature of the tax profession, particularly in large firms, a range of employees including interns, contractors, and associates may all work collectively to provide tax agent services on behalf of a registered tax practitioner. Ensuring that all these individuals are appropriately supervised and competent when providing tax agent services is an essential part of tax practitioners' duties as registered agents are ultimately liable for the delivery of competent tax agent services and any sanctions for non-compliance.

In practice, this will require tax practitioners to ensure that unregistered staff providing tax agent services on their behalf are provided with adequate training to provide the services they are providing on behalf of the practitioner competently, and substantive review and sign-off of work is conducted prior to sending work to the client or submitting returns on behalf of the client.

#### Subdivision F – Other responsibilities

##### **Quality management systems**

Section 40 requires all tax practitioners to establish, maintain, document and enforce a quality management system to provide confidence that they are compliant with the Code.

Although the note to section 40 provides further explanation of procedures that would generally be included, the extent of internal controls in place will differ significantly between tax practitioners based on the size of individual practices, the level of day-to-day engagement by a tax practitioner on the tax agent services being provided, and the complexity of the services being provided as well as the complexity of clients' tax affairs. For example, a large firm providing various streams of tax agent services to multinational clients, would be expected to employ extensive internal controls in place to provide reasonable assurance that all tax practitioners within the firm (as well as the firm itself) are compliant with the Code. Examples of this include:

- regular training of new and existing staff on their obligations under the Act when providing tax agent services whether or not as a registered tax practitioner;
- the use of information barriers where there is a conflict of interest between current and former clients;
- quality assurance processes and systems to review the accuracy and standard of services being provided to clients;
- authorisation and risk management processes considering potential conflicts of interest prior to accepting new clients;
- file management system with access controls, limiting the users able to access confidential information;
- documented reporting lines and responsibilities to ensure staff duties are effectively segregated and prevent the incidence of fraud or non-compliance; or

- independent internal control reviews.

Further details about appropriate quality management processes can be found in *APES 320 Quality Management for Firms that provide Non-Assurance Services* released by the Accounting Professional and Ethical Standards Board.

Comparatively, individual tax practitioners with clientele from the local community would require less sophisticated internal controls. These may include physical controls over filing cabinets, conducting and documenting a conflict of interest and know-your-client check prior to engaging or re-engaging a client, and regularly updating software to ensure information remains confidential. Policies on the recruitment, training and management of employees will not be applicable if there are no employees, so that fact can be noted in the documentation of policies. However, all tax practitioners would be expected to have appropriate systems in place to ensure no disqualified entity has been engaged to provide tax agent services on their behalf.

Section 40 also applies to broader organisational policies and procedures that have an impact on compliance with the Code and integrity. For example, the obligations could require an organisation to have appropriate policies and procedures in relation to recruitment, training, supervision, information sharing, reporting, record-keeping, security, information technology, human resources, dealing with complaints and workplace culture. Ultimately, tax practitioners will be required to exercise professional judgement to determine appropriate controls dependent on a range of circumstances including the size, nature and clientele of the organisation. A tax practitioner would be expected to keep the documentation relating to their system of quality management up-to-date and able to be made available to the Board for inspection upon request (including a version history of the system over a reasonable review period).

### **Keeping your clients informed of all relevant matters**

Subsection 45(1) imposes an obligation on tax practitioners to advise all prospective and current clients of certain matters. All current and prospective clients need to be advised of:

- any matter that could significantly influence the decision of a client to continue to engage the individual tax practitioner or tax practitioner firm to provide a tax agent service; and
- any matter that could significantly influence the decision of a prospective client to engage the individual tax practitioner or the tax practitioner firm to provide a tax agent service; and
- the Board maintaining a register of tax agents and BAS agents; and
- how current or prospective clients can access and search that register; and
- how a client or prospective client can make a complaint about a tax agent service they have received, including the complaints process of the Board.

Prospective clients will include individuals and entities that have contacted a tax practitioner in relation to the provision of services, which could include by email, phone or website. Although a prospective client may not yet have received tax agent services from the tax practitioner that is advising them of the complaints process, it is helpful for them to

have information about the complaints process in advance, before receiving tax agent services from the tax practitioner.

Paragraph 45(1)(a) ensures that prior to engaging, re-engaging or continuing to engage a tax practitioner for their services, clients are fully informed of any matters that may significantly influence that decision. Without limiting the scope of the obligation, relevant matters could include:

- a prior material breach of the Act or instruments made under the Act;
- a current investigation by the Board of a material breach;
- any sanctions imposed by the Board;
- any conditions applying to registration;
- any potential use of disqualified entities in relation to that client or potential client;
- any charge or conviction relating to an offence relating to fraud or dishonesty;
- imposition of a promoter penalty under the tax law; or
- any charge or conviction relating to a tax offence.

If a tax practitioner is required to advise of a current investigation by the Board, and the investigation by the Board ultimately finds no breach, or any breaches found by the investigation are not material, the tax practitioner could provide that update. Conversely, if the Board investigation finds a material breach, that would need to be advised to current and prospective clients if it could significantly affect decisions to engage or continue to engage the tax practitioner. To the extent that section 45 may require disclosure of a material breach, about which it is possible that a tax practitioner has received legal advice, the disclosure of information about the breach is not intended to require the tax practitioner to disclose the advice itself or otherwise waive legal professional privilege.

Materiality in this context, is a breach that a reasonable person would have regard to, as part of their decision-making, to engage or re-engage the tax practitioner.

Disclosure to prospective and current clients should go beyond any non-compliance of the individual tax practitioner and extend to matters relating to any company or partnership they work under, if the matter could significantly influence the decision to engage or continue to engage a tax practitioner within the company or partnership. This provision will further increase the transparency of the tax profession, which is critical to ensuring the integrity of the tax system as a whole.

Subsection 45(2) sets out requirements as to how tax practitioners advise all current and former clients. The information set out in subsection 45(1) must be given in writing in a prominent, clear and unambiguous way. This requirement provides flexibility to tax practitioners as to the system they use to advise clients and prospective clients, as not all tax practitioners may have a website or use client engagement letters.

In relation to information about matters that could significantly influence a client's decision to engage or continue to engage a tax practitioner, if a client or prospective client

makes inquiries to engage or re-engage a tax practitioner, the tax practitioner must provide this information at the time of the inquiry or when responding to the inquiry. If a client or prospective client does not make such inquiries, for example, if the tax practitioner is currently already engaged in providing services to the client, then the tax practitioner must advise the client of a matter within 30 days of becoming aware of the matter.

Information in relation to the Board's register or complaints process needs to be advised when the client or prospective client engages or re-engages the tax practitioner, or if the client makes a relevant request for information. A client does not specifically need to ask about the register or the complaints process to make a relevant request. For example, a relevant request could be if the client asks what they can do if they aren't happy with a tax agent service provided, or how they can know if a tax agent is registered or not.

The section provides an example demonstrating that if the relevant information is provided on a publicly accessible website and in engagement and re-engagement letters given to each client, the tax practitioner will have met the requirement to have 'given information' to all current and prospective clients as required by the section. The information would need to be published on the website and included in engagement letters in a prominent, clear and unambiguous way in order to meet the other requirements of paragraph 45(2)(a). In relation to the duration of publication on a website, information in relation to paragraph 45(1)(a) would need to be published for the duration for which the matter could significantly influence a client's decision to engage or continue to engage the tax practitioner.

#### Application

This Instrument applies to tax practitioners on or after the day it commences, unless otherwise specified. To avoid doubt, the record-keeping obligation applies to tax agent services provided on or after commencement.

#### Transitional rules

Section 45 will apply to matters that have arisen on or after 1 July 2022. For matters which arose between 1 July 2022 and commencement, disclosure to clients must be made within 90 days of this Instrument commencing.



**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

*Tax Agent Services (Code of Professional Conduct) Determination 2024*

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Legislative Instrument**

The *Tax Agent Services (Code of Professional Conduct) Determination 2024* (the Instrument) contains obligations that apply to tax agents and Business Activity Statement agents (collectively referred to as tax practitioners). These obligations supplement the existing obligations in section 30-10 of the *Tax Agent Services Act 2009* (TASA) and together form the Code of Professional Conduct (the Code).

The Instrument contributes to the strengthening of the regulatory framework in the context of recent public scrutiny of misconduct in the tax practitioner profession. It contains additional obligations concerning honesty and integrity, false or misleading statements, conflicts of interest, confidentiality of government information, record-keeping, competence, quality management systems and advising clients of matters that could significantly impact their decision to engage a tax practitioner.

All section references are references to the Instrument, unless otherwise stated.

**Human rights implications**

The Instrument engages the following rights:

- the right to privacy;
- the right not to self-incriminate;
- the right to work; and
- the right to implied freedom of political communication.

**Privacy**

Under Article 17(1) of the ICCPR, no one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation. The instrument engages this right by requiring that tax practitioners:

- notify the Tax Practitioner’s Board (the Board) or the Commissioner of Taxation (the Commissioner) that a statement is false, incorrect or misleading if the maker of a statement refuses to correct the statement (section 15);
- disclose the details of a material conflict of interest that arises in connection with an activity undertaken for the government agency to the government agency as soon as becoming aware of it (section 20);

- keep correct records of all services provided, including all relevant information considered in the provision of the tax service (section 30); and
- keep clients informed of all matters that may significantly impact their decision to engage the tax practitioner (section 45).

The right in Article 17(1) may be subject to permissible limitations, where these limitations are authorised by law and are not arbitrary. For an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the circumstances. The UN Human Rights Committee has interpreted the requirement of ‘reasonableness’ to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

Where a tax practitioner becomes aware that their statement to the Board or Commissioner is false, incorrect or misleading, they are required to correct it. Where they become aware that a client’s statement to the Board or Commissioner is false, incorrect or misleading, and the client doesn’t correct it, the tax practitioner must notify the Board or Commissioner that the statement made is false or misleading. This ultimately involves providing the Board or Commissioner with a type of personal financial information. However, that information is already required to be provided under existing laws and is already required, as a matter of law, to be correct when made. The Instrument contains obligations to correct or notify where information provided was incorrect or misleading. It is in the public interest to ensure the Board and Commissioner have appropriate oversight and that submitted tax statements are accurate, so the impact on the right to privacy is appropriate and lawful.

The obligation to disclose details of material conflicts of interest to government agencies is pre-existing under the TASA. The instrument adds requirements to manage, mitigate and avoid conflicts of interest, which of themselves do not require any additional disclosure of private information beyond what is already required by the TASA.

The obligation to maintain records of tax agent services provided does not require any additional disclosure of private information, merely an obligation to record that information. Tax practitioners will continue to need to maintain appropriate confidentiality of client records.

The obligation to keep clients informed of matters that could significantly influence a client’s decision to engage, or continue to engage, the tax practitioner’s services engages the right to privacy. This new obligation gives effect to the Government’s commitment to restore public trust and confidence in the regulation of the tax profession, in light of recent integrity concerns. It complements the Board’s register of tax practitioners to provide increased transparency to clients when they choose to engage or re-engage a tax practitioner. While publicly available, the register may not be accessed by current and prospective clients. By requiring clients to be advised of relevant matters, the Code obligation provides greater assurance that clients will receive relevant information before engaging or re-engaging a tax practitioner.

It is only if information could significantly influence an engagement decision that it needs to be disclosed; not information with only marginal potential influence. This is an appropriate and proportionate engagement. Disclosure in this context equips Australian government agencies and other clients with the necessary information to select appropriate service providers. This disclosure benefits tax practitioners who have complied with their obligations.

Government agencies must be selective about who they provide work and information to, which can ultimately impact Australia's security and economy. It is important that government agencies are aware of any cause for concern before selecting a service provider.

Tax practitioners have considerable expertise and knowledge that their clients do not necessarily have. This means the relationship between a tax practitioner and a client has a degree of vulnerability and trust. As a result, individuals have a right to make an informed choice about who provides these services. Businesses also have the right to make informed choices about who they engage to provide services and who they provide commercially sensitive information to. Further to this, the ability to promote informed choices ultimately improves the market for these services, increasing competition and the quality of services.

The limitations on the right to privacy are consistent with existing tax and business obligations and do not conflict with human rights.

### **Self-incrimination or disclosure of a civil contravention**

Article 14(3)(g) of the ICCPR states that in the determination of a criminal charge against them, every person has the right not to be compelled to testify against themselves or confess guilt. The Instrument requires that tax practitioners:

- correct an incorrect statement, or notify the Board or Commissioner that a statement is false or incorrect if the maker refuses to correct the statement (section 15);
- disclose the details of any material conflict of interest (real or apparent) that arises in connection with an activity undertaken for the agency as soon as you become aware of the conflict (section 20); and
- keep existing and prospective clients informed of all matters that may significantly impact the client's decision to engage them (section 45).

While it is possible that those obligations may require a tax practitioner to take an action that reveals to others that they have breached a Code obligation, they do not require a tax practitioner to admit to guilt in relation to any criminal charge or to testify against themselves. The obligations are not undertaken in the determination of a criminal charge against the tax practitioner and the Code does not impose a criminal penalty for its contravention. The instrument therefore does not impede on those human rights.

### **The right to work**

Sections 35 and 40 engage the right to work under Articles 6(1) and promotes the right to work under Article 6(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to work provides that everyone must be able to freely accept or choose their work and includes a right not to be unfairly deprived of work. This instrument engages the right to work in Australia by introducing a requirement engaging third party tax agent services to do the following:

- uphold and promote the Code (section 10);
- ensure tax agent services provided on your behalf are provided competently, through maintaining knowledge and skills and adequate supervision (section 35); and
- maintaining a system of quality management in relation to the provision of tax agent services, directed at providing the tax agent with assurance that they are complying

with the Code, which would include policies in relation to the recruitment, training and management of employees (section 40).

Those obligations may limit employment opportunities in the sector for people who do not demonstrate honesty and integrity, are not able to reach an adequate level of competency for their role, or who would otherwise give a tax practitioner cause for concern that they may breach the Code if they employ them. Additionally, a breach of the Code can result in sanctions including suspension or termination of registration as a tax practitioner.

However, the obligations do not include any explicit requirement to deprive someone of employment, and in any case are an appropriate and proportionate response to the need to ensure that tax agent services are provided competently and ethically. If tax agent services were provided without adequate training or supervision, this would undermine the integrity of the tax profession and the tax system. It is appropriate to hold tax practitioners to a high standard.

The Board would take into consideration all the relevant circumstances in deciding on the appropriate sanction, if any, in response to a breach of the Code. Even if a tax practitioner had their registration suspended or terminated, this does not prevent the person from finding work in a different capacity.

For the reasons provided, the obligations are compatible with the right to work.

### **Implied freedom of political communication**

The High Court has inferred a freedom of political communication from sections 7 and 24 of the *Constitution*, as they require that members of the Parliament must be “directly chosen by the people”. However, the Court has recognised that the implied freedom can be limited or burdened by laws that are reasonably appropriate and adapted to serving a legitimate end in a manner which is compatible with the Australian system of representative and responsible government.

Subsection 25(1) engages the implied right to freedom of political communication to the extent that it limits the disclosure of information obtained from Australian government agencies. This could, for example, prevent a tax practitioner from publicly communicating their views on a proposed law reform if the government agency hasn’t authorised disclosure of information about the proposed law reform. However, this limitation facilitates effective policy development and implementation.

Government policies or measures on which tax practitioners would be invited to share their expertise can be politically and strategically sensitive. Government agencies must be in a position to share information efficiently and without concern that this information will be disseminated elsewhere. Ensuring that any information a tax practitioner receives in a professional capacity is confidential by default is a reasonably appropriate and adapted to serving a legitimate end.

### **Conclusion**

The Instrument is compatible with the human rights engaged as, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.